SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. [redacted] 312

THE MATERIAL HANDLING INSTITUTE, INC.,
Petitioner,

v.

RICHARD W. McLAREN, Assistant Attorney General of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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THE MATERIAL HANDLING INSTITUTE, INC.,
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RICHARD W. McLAREN, Assistant Attorney General of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, The Material Handling Institute, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 8, 1970.

Opinions Below

The opinion of the Court of Appeals, not yet reported, and the opinion of the District Court for the Western District of Pennsylvania, not reported, appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on May 8, 1970, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U. S. C. § 1254(1). The jurisdiction of the District Court was based upon 15 U. S. C. § 1314(b).

Questions Presented

1. Whether the Antitrust Civil Process Act permits the attorney general (or his assistant) to obtain from a person under investigation by him documentary material which is not relevant to his investigations.

2. Whether a Civil Investigative Demand for irrelevant documents constitutes an unreasonable search and seizure in violation of the fourth amendment to the federal constitution.

Statutory Provisions Involved

United States Code, Title 15, §§ 1312(a), (b)(1), (c)(1) —Antitrust Civil Process Act—set forth in the Appendix hereto.

Constitution of the United States, Amendment No. IV—Searches and Seizures—set forth in the Appendix hereto.

Statement of the Case

Respondent, the assistant attorney general in charge of the antitrust division of the United States Department of Justice, began an investigation of the lawfulness under section 1 of the Sherman Act (15 U. S. C. § 1) of one of the membership requirements of petitioner, an incorporated

trade association composed of companies engaged in the manufacture of material handling equipment in the United States. Petitioner's by-laws limited membership to concerns which manufactured at least 75% of their annual output in the United States, thus excluding foreign manufacturers. This was the only subject of respondent's investigation.

Respondent orally requested petitioner to furnish a list of the firms in the industry which, though eligible, were not members of petitioner. Upon being asked how such a list would be relevant, respondent gave no answer except for a categorical assertion that it was relevant (Record Appendix below, p. 54a). Petitioner then refused to furnish such a list, and respondent served a Civil Investigative Demand, identified as C. I. D. No. 1067, under the Antitrust Civil Process Act.

Petitioner, by petition filed in the District Court to set aside the demand, challenged respondent's right to the list, but the District Court upheld the demand, on the doubtful premise that a subpoena *duces tecum* to produce the non-member list before a grand jury would be sustained. The Court of Appeals affirmed on a different ground, saying that respondent's explanation in his brief adequately demonstrated the relevancy of the document sought. This explanation was that the reasons eligible non-members have not joined the Institute are relevant to any analysis of the competitive impact of the Insfitute and thus to the anticompetitive effect of its membership policy.

REASONS FOR GRANTING THE WRIT

I. The decision below sanctions investigative power in the government far beyond what the statute permits.

The decision of the court below has the effect of granting to the Department of Justice investigative power far more sweeping than any ever previously sanctioned, under a statute which has never been passed upon by the Supreme Court. In giving the department this power, the court below disregarded the intent of Congress, clearly expressed in the statute, that the attorney general (or his assistant in charge of the antitrust division) can obtain only documents which are relevant to his investigation.

Respondent's investigation of petitioner is limited to the legality of petitioner's membership requirement which excludes foreign manufacturers. Such restriction, if illegal, would be in the nature of a boycott and might thus constitute a *per se* violation of section 1 of the Sherman Act under the decision in *Klor's v. Broadway-Hale Stores*, 359 U. S. 207 (1959). As the opinion of Mr. Justice Black in that case pointed out, the impact of *per se* illegality upon the economy is completely irrelevant. It is the impact upon those who are excluded which is relevant.

The same is true in the case at bar. The reasons which the non-members who are eligible to become members of petitioner may give for not wishing to join can have nothing to do with the legality of petitioner's requirements under which others are ineligible to join although they may desire to do so.

Respondent's contention, if permitted to stand, would remove all limits on the documents which he can obtain. He would need only to state that he wished to see certain

records to enable him to ascertain from parties named in them whether they believed that the conduct of the persons under investigation might have an anticompetitive effect on the nation's economy. It is difficult to imagine how the reasons which domestic material handling equipment manufacturers may assert for not joining the Institute can have any bearing on the legality of the Institute's by-law provision excluding foreign manufacturers from joining.

II. The decision below violates petitioner's constitutional rights.

Under well-recognized principles, a grand jury subpoena which oversteps permissible bounds constitutes an unreasonable search and seizure, in violation of the fourth amendment to the Constitution: *Hale v. Henkel*, 201 U. S. 43, 76 (1906). The same would be true of any other type of compulsory process, such as a civil investigative demand under the Antitrust Civil Process Act. The latter is more dangerous to liberty than a grand jury subpoena, for a grand jury is not lightly empaneled, and its composition of private citizens can act as a checkrein upon the zeal of the government prosecutors. But no such check curbs the assistant attorney general in charge of the antitrust division when he decides to issue a civil investigative demand. He can complete and post it in a matter of minutes. For this reason the Court must restrain him when he transgresses permissible limits.

Conclusion

Review of the decision below is necessary both to protect the present petitioner and to indicate to respondent the limits of his authority for use on future occasions. A writ

of certiorari should accordingly issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Attorneys for Petitioner.

June ..., 1970.

APPENDIX

Relevant Docket Entries

1969

Dec. 17 Clerk's fees $25.00.

Dec. 17 Copy of Notice of Appeal, rec'd November 10, 1969, filed.
Record, rec'd. December 8, 1969, filed.

1970

Apr. 7 Argued. Coram: Seitz and Aldisert, Circuit Judges and Latchum, District Judge.

May 8 Opinion of the Court (*Seitz*, Aldisert, Circuit Judges and Latchum, District Judge), filed.

May 8 Judgment affirming, with costs taxes in favor of appellee the judgment of the District Court filed October 14, 1969, filed.

Antitrust Civil Process Act

Public Law 87-664; 76 Stat. 548, 15 U. S. C. §§ 1311-14.

CIVIL INVESTIGATIVE DEMAND

SEC. 3*(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;

* * *

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena *duces tecum* issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation;

* * *

15 U. S. C. § 1312.

Constitution of the United States, Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Memorandum and Order to Set Aside Civil Investigative Demand

(Filed October 11, 1969.)

This issue comes before me pursuant to the provisions of the Antitrust Civil Process Act, 76 Stat. 548; 15 U. S. C. §§ 1311-1314. The Attorney General has under investigation the Material Handling Institute, Inc., the petitioner herein.

Petitioner is a non-profit corporation organized and existing under the laws of the State of Delaware and has its principal place of business at 250 Gateway Towers, in the City of Pittsburgh, Allegheny County, Pennsylvania. Petitioner is a membership corporation of the type known as a trade association, and its members include United States manufacturers of industrial material handling equipment.

The respondent is Richard W. McLaren, Assistant Attorney General of the United States in charge of the Antitrust Division of the Department of Justice.

The matter comes before me on the petition of the Material Handling Institute, Inc., to set aside a civil inves-

tigative demand now called—CID No. 1067. In response to the petition to set aside CID No. 1067, respondent filed a reply, memorandum, affidavit, and a reply brief. The petitioner then filed a motion for judgment on the pleadings. Respondent now says that the motion for judgment on the pleadings is improper because a petition seeking an order setting aside an investigative demand is not a pleading, but on the contrary is analogous to a subpoena *duces tecum*. He says the petition should be considered like a motion to quash a subpoena *duces tecum*. But it is noticed in the statute, § 1314 (b), that the language is:— ". . . a petition for an order of such court modifying or setting aside such demand." It is noticed of course that the statute makes the Federal Rules of Civil Procedure applicable when consistent with the provisions of the statute. In any event, the matter is before me on the documents filed. An issue seems adequately joined as between the parties. The decision in the *Gold Bond Stamp Company* case, 221 F. Supp. 391 (1963), is authoritative, and as Judge Nordbye has carefully reviewed the provisions of the statute and the reason for its enactment by the Congress, it seems unnecessary to repeat what has been ably said by him.

It is noticed as above that CID No. 1067 is the subject of this controversy. But this demand did not strike petitioner "out of the blue" so to speak. A prior CID No. 0916 had been served on petitioner, and it had been complied with. Both sides in their briefs have referred to the "History of the Case." Respondent's narration of the history is contained in its reply brief and for convenience is inserted here: —

HISTORY OF THE CASE

Respondent's investigation of petitioner was commenced when it came to respondent's attention that petitioner's by-laws contained a restrictive provision which excluded from its membership firms whose yearly sales consisted of less than 75% of domestically manufactured equipment. Respondent learned that excluded non-member firms, both foreign and domestic, were denied permission to exhibit their equipment at the trade show sponsored by petitioner. Since these trade shows appeared to be important media for the marketing of material handling equipment, and, therefore, significant to competition in the industry, respondent proceeded to gather facts in order to determine whether the exclusion of material handling equipment firms from membership in petitioner, whose membership is comprised of competing firms, constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act (15 U. S. C. 1).

Respondent commenced the investigation by directing letters of inquiry to petitioner (Exhibits Nos. 1 and 4) when it became apparent that documentary information was required, respondent, pursuant to the provisions of the Antitrust Civil Process Act, 76 Stat. 548, 15 U. S. C. 1311-1314 (hereinafter referred to as "The Act"), issued Civil Investigative Demand No. 0916 (hereinafter referred to as CID 0916) (Exhibits Nos. 6 and 7) to petitioner.

After production of the documents demanded by CID 0916 had been completed, respondent asked for a copy of petitioner's Addressograph mailing list containing the names and addresses of the 500 firms, which petitioner had stated in his answers to CID 0916 (Exhibits Nos. 8 and 9), were not members of petitioner but eligible for membership in petitioner. In this connection, it should be noted

that as part of the production of documents under CID 0916, petitioner had produced a copy of its Addressograph mailing list listing its membership. Petitioner refused to give respondent a copy of its non-member list, unless respondent agreed that it would not contact the firms listed (Exhibit No. 12), and explained how the list would be used in respondent's investigation (Exhibits No. 12 and 13). Respondent explained to petitioner that the document was relevant and essential to an inquiry into the legality of the restrictive membership provision in the petitioner's by-laws, but refused to disclose how the list would be utilized in the Government's investigative procedure (Exhibit No. 14).

After respondent had been advised by petitioner that it would not produce the list, respondent issued Civil Investigative Demand No. 1067 (hereinafter referred to as CID No. 1067), to petitioner. Petitioner has moved for an order setting aside CID No. 1067. Respondent's Memorandum was filed in opposition to the petition to set aside.

Petitioner lists some 6 reasons why CID No. 1067 should be set aside. These reasons are set forth in Paragraphs 13 through 18 inclusive of the petition. But it seems to this Court that Nos. 13 and 15 raise the issue to be decided here. No. 13 says that the demand fails to state the nature of the conduct constituting the alleged antitrust violation, and No. 15 says that the document described in CID No. 1067, that is the list of non-members, could not possibly be relevant to any civil antitrust investigation of petitioner. But this demand was not issued on a clean slate. The parties concede that prior to CID No. 0916, respondent's predecessor had sent a letter of inquiry with respect to the provision in petitioner's by-laws which excluded from memberships firms whose yearly

sales consist of less than 75 percent of domestically manufactured equipment, and that non-member firms were denied participation in trade shows sponsored by petitioner. This letter was sent April 20, 1967. Thereafter the parties had correspondence on the subject, and at least one meeting was held. On November 24, 1967, CID No. 0916 was issued. Item 8 of that demand referred to non-members. But negotiation and letters which followed and in petitioner's reply to CID No. 0916, respondent learned that petitioner knew of some 500 non-members who were nevertheless eligible for membership in the association.

It should be noticed at this point that Section 1312 (c) (1) is entitled: —*Reasonableness; privilege.* (c) (1) requires that no—

> ". . . demand shall contain any requirement which would be held to be unreasonable if contained in a subpoena *duces tecum* issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation: . . ."

It appears to this Court that petitioner's suggestion that the "nature" and the "relevancy" are not set forth in the instant demand is not tenable. As the statute is read, if a subpoena *duces tecum* would produce the list of non-members, then the CID should also require it to be produced. It seems significant that (c) (1) refers to a subpoena. A subpoena is issued as a matter of course by the clerk. It does not require judicial action in the first instance. The subpoena *duces tecum* simply requires the witness to bring with him the books, documents, et cetera, as described therein. On a motion to quash a subpoena *duces tecum*, the Court hears the whole background and reasons why it is issued and determines reasonableness. It is seldom that a court will rule with finality that a document is relevant when hearing a motion to set aside a sub-

poena *duces tecum*, but it is very common that a court will hold that a party needs a record as a matter of information in the lawsuit to determine whether or not relevancy exists when all the evidence is considered.

It must be remembered that this is an investigative procedure only. For this Court to rule that the list of non-members is not relevant would likely end the investigation. In the affidavit of Richard J. Torre, Esq., Department of Justice Attorney, some 16 letters between the parties are attached as are copies of the two demands, CID Nos. 0916 and 1067. Under the undisputed evidentiary documents and giving full consideration to the oral arguments of counsel, if this were a proceeding to set aside a subpoena *duces tecum*, it would be denied. It seems to this Court that giving the same considerations to the entire record, CID No. 1067 must be honored by petitioner.

Another objection by petitioner is that it should not be required to produce a non-existent document. But it seems to the Court that under the definition contained in the statute § 1311 (g), "documentary material" includes petitioner's 500 or so Addressograph plates, which will show the names of the non-members eligible for membership in the association. This section of the statute must be broadly construed.

The petition to set aside Civil Investigative Demand No. 1067 must be and is denied.

IT IS SO ORDERED this 14th day of October 1969.

JOSEPH P. WILLSON,
Senior District Judge.

cc: Edmund K. Trent, Esq.
Richard L. Thornburgh, USA.
Richard J. Torre, Dept. of Justice.

Opinion of the Court

(Filed May 8, 1970.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18403

THE MATERIAL HANDLING INSTITUTE, INC.,
Appellant,

v

RICHARD W. McLAREN.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 7, 1970

Before SEITZ, ALDISERT, *Circuit Judges*, and LATCHUM, *District Judge*.

SEITZ, *Circuit Judge*.

The Material Handling Institute, Inc. (Institute) appeals from a district court order denying its petition to set aside a Justice Department Civil Investigative Demand (CID). Jurisdiction for this appeal is predicated on Section 5(d) of the Antitrust Civil Process Act, 15 U. S. C. §§ 1311, *et seq.*

The Institute, a nonprofit trade association, has been the subject of a Justice Department investigation since 1967. The investigation has focused on the potential anticompetitive effects inherent in the Institute's restrictive membership policy. The Institute limits membership to those firms selling material handling equipment with 75% or more of their sales income derived from sales of domestically manufactured equipment.

Prior to the issuance of the CID in question, the Institute had always complied with the Department's requests for information. However, when the Department sought a list of nonmember firms eligible for membership, the Institute refused primarily because it was "fearful that any approach by [the Department] to these companies [would] interfere with its future relationship with them."[1] The CID seeking such a list was then served.

The Institute petitioned the district court to set aside the CID. The Justice Department responded with a lengthy memorandum of points and authorities and a supporting affidavit. At this point in the proceedings, the Institute moved for judgment on the pleadings. After a hearing on this motion, the district court issued a memorandum and order denying both the Institute's motion and petition to set aside.[2] This appeal followed.

On appeal the Institute advances three reasons why its petition should have been granted below. The first reason proferred is that the CID is formally insufficient because it fails to adequately describe the allegedly unlawful conduct under investigation. Section 3(b)(1) of the Act requires

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[1] Letter from Edmund Trent, attorney for the Institute, to the Justice Department, February 25, 1969.

[2] Neither side contends a ruling on the merits at this stage of the proceedings was premature.

that each CID "state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of the law applicable thereto . . ." 15 U. S. C. § 1312 (b)(1). In attempting to comply with this requirement, the Department stated in its CID that it was investigating a possible violation of section 1 of the Sherman Act by a "contract or combination in unreasonable restraint of trade."

Such a terse statement might, standing alone, present serious questions concerning its conformity with the statutory purpose to inform the recipient of the CID of the conduct under investigation. On the present record, however, there can be no doubt that the Institute understood what conduct was under investigation. There is a two-year history of correspondence and telephone conversations as well as one other CID, all of which sought information concerning the anticompetitive effects of the Institute's restrictive membership practices. Indeed, a Justice Department letter shortly before the issuance of the CID specifically tied the need for the nonmember list to its investigation "of a restrictive membership provision in the by-laws of the Institute."[3] In light of this record, we believe the CID fulfilled the demands of the statute. 15 U. S. C. § 1312(b)(1). See Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397-98 (D. Minn. 1963), aff'd *per curiam*, 325 F. 2d 1018 (8th Cir. 1964).

The second reason offered by the Institute for setting aside the CID is that the documents sought are not relevant to the Department's inquiry. The Institute makes a two-pronged attack here. First it urges that the Department never denied the assertion of irrelevancy in the Institute's

[3] Letter from Richard J. Torre, Justice Department Attorney, to the Institute, March 4, 1969.

petition to the district court and thus it stands admitted. Without deciding whether allegations in such petitions are admitted if not denied, we reject the Institute's contention on the facts. We believe the Department effectively denied this assertion in its memorandum of points and authorities when it said the "document requested, which lists nonmembers [*sic*] firms eligible for membership [*sic*] is obviously relevant to any consideration of the anticompetitive effects of a by-law provision restricting membership."

The Institute also argues that the document sought by the CID does not meet the relevancy requirement of the Act.[4] The Department argues that the reasons eligible nonmembers have not joined the institute are relevant to any analysis of the competitive impact of the Institute and thus to the anticompetitive effect of its membership policy. This explanation in our view adequately demonstrates the relevancy of the document to an inquiry into a potential violation of section 1 of the Sherman Act.

The Institute's final argument is that it cannot be ordered to comply with CID because it does not possess the document demanded. This claim is based on the tenuous distinction the Institute would draw between possession of addressograph plates listing addresses of eligible nonmembers and the possession of a printed list. Because it possesses only addressograph plates, the Institute argues, it cannot be forced to produce a list. We note initially that the statutory definition of "documentary materials" encompasses all "records." 15 U. S. C. § 1311(g). Moreover, it would be a subversion of the Act's clear intent to

[4] Section 3 of the Act provides in relevant part:

"Whenever the Attorney General . . . has reason to believe that any person under investigation may be in possession, custody, or control of any documentary material *relevant* to a civil antitrust investigation, he may . . . issue . . . a civil investigative demand . . ." (Emphasis added) 15 U. S. C. § 1312(a).

low a business entity to insulate its records from appro-
iate investigation by the use of modern information stor-
e techniques.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 18,403

THE MATERIAL HANDLING INSTITUTE, INC.,
Appellant,

vs.

RICHARD W. McLAREN.

(D. C. Civil Action No. 69-565.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ and ALDISERT, *Circuit Judges* and LATCHUM, *District Judge*.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 14, 1969, be, and the same is hereby affirmed, with costs taxed in favor of appellee.

ATTEST:

THOMAS F. QUINN,
Clerk.

May 8, 1970